

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

Periodic Reporting (NPPC et al. Proposal One)

Docket No. RM2023-3

**RESPONSE OF MAILER ORGANIZATIONS TO UNITED STATES POSTAL
SERVICE MOTION FOR LEAVE TO FILE REPLY COMMENTS**

(February 22, 2023)

Pursuant to Rule 3010.160(b), the undersigned mailer organizations¹ (“Mailers”) submit this response to the Motion of the United States Postal Service for Leave to File Reply Comments Regarding Mailers’ Proposal One (“USPS Motion”). Mailers do not oppose the Postal Service’s request for leave to file reply comments. The USPS Motion, however, materially mischaracterizes the procedural posture and history of this proceeding and the Commission rules governing it. Mailers submit this response to clarify the record.

First, the Postal Service argues that PostCom and the Mailers “improperly” submitted comments on their own proposal. USPS Motion at 1. It points to no Commission rule, however, that prohibits such comments. In fact, Commission rules expressly allow any interested party to submit comments on a proposal to change analytical principles.

Rule 3050.11 governs proposals to change accepted analytical principles, and Rule 3050.11(a) allows “any interested person” to submit a petition to the Commission “to initiate . . . a proceeding” to change an accepted analytical principle. Upon the submission of a petition, the Commission may, but is not obligated to, order discovery, issue information requests, or hold

¹ These organizations are the Association for Postal Commerce (“PostCom”), Major Mailers Association, National Association of Presort Mailers, National Postal Policy Council, and N/MA – The News/Media Alliance. These organizations also joined in the Mailer Comments on the Appropriate Analytical Principle for Retiree Health Benefit Normal Costs, filed in this docket on February 8, 2023.

technical conferences to evaluate whether to accept the petition. 39 C.F.R. § 3050.11(c). Rule 3050.11(d) governs action on the petition and the procedures the Commission should employ. It states that *the Commission* shall determine whether to issue a notice of proposed rulemaking based on the petition and the supporting material received. That is, the burden on the proponent of the petition is to convince the Commission that a rulemaking proceeding is warranted. The consideration of whether to adopt an analytical principle is separate from the determination of whether to open a rulemaking docket in response to the petition.

Once the Commission has determined that a rulemaking docket is appropriate—as the Commission did in Order No. 6430—it will issue a notice of proposed rulemaking based on the petition and evaluate the proposed rule “by procedures that are consistent with 5 U.S.C. 553,” the notice and comment procedures of the Administrative Procedure Act. 39 C.F.R. § 3050.11(d)(1). Consistent with that statute, the Commission provides “[i]nterested parties” an opportunity to present written comments and reply comments. *Id.* Rule 3050.11(d) does not limit “[i]nterested parties” to parties other than the original petitioner. *See also* 39 C.F.R. § 3010.140 (“[A]ny person may submit comments in proceedings before the Commission.”).

PostCom and the petitioning Mailers are undoubtedly “[i]nterested parties” and therefore entitled to file comments on the Commission’s notice. While the original proponent of a change in analytical principles usually does not see the need to comment once the Commission has opened a rulemaking docket to consider the change, that is a matter of practice and strategy, not law.² The Commission’s action is an informal rulemaking action, not an adjudication or formal

² In this connection, the Postal Service mischaracterizes footnote 1 of the Mailers’ comments, claiming Mailers “acknowledge . . . that proponents of a proposal are not entitled to file comments on their own proposals.” Footnote 1 actually states that “proponents (typically the Postal Service) do not file initial comments on their own proposals,” referencing a factual matter of practice, not a legal prohibition on the alternative practice. Mailers did not ask for a waiver of any rule because there is no such prohibition; any interested party may file comments.

rulemaking subject to hearing procedures and additional due process controls. The Commission's decision regarding whether to accept the change in analytical principle is thus governed by the standards of the APA in the context of informal rulemaking, specifically whether the decision to accept or reject the principle is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). That determination is based on the record before the agency. Once the rulemaking docket has been opened, the proponent of the change bears no special burden of persuasion, and the Commission is not obligated to accept or reject the proposal based on a particular evidentiary standard. Rather, as long as that decision is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," it will be upheld. Accordingly, allowing any interested party—including the proponent—to file comments on the Commission's notice does not implicate any "fundamental principle of due process," contrary to the Postal Service's Claim. USPS Motion at 2. If there is any question of "procedural fairness," USPS Motion at 4, it arises from the Commission's own rules allowing any interested party to file comments and would be alleviated by accepting the Postal Service's reply comments.³

Second, the Postal Service argues that PostCom inaccurately claims that mailers have not had an opportunity to address the application of the analytical principle that economic costs cannot exceed accounting costs in prior filings. USPS Motion at 2-3. The Postal Service, however, does not point to any *Commission* statements addressing this principle prior to Order No. 6340, likely because no such statements were made. The entire analysis of the retiree health benefit normal cost treatment in Order No. 6363 consists of the following:

Treatment of amortization and normal costs. With respect to the issue of amortization and normal costs, the PSRA amended how the Postal Service's

³ Although Order No. 6430 did not provide for reply comments, Rule 3050.11(d) states, "Interested parties will be afforded an opportunity to present written comments and reply comments."

retiree health benefits are funded. PSRA section 102 repealed former 5 U.S.C. § 8909a(d) requiring the Postal Service to make the amortization and normal cost payments and replaced it with a new requirement that the Postal Service pay into the Postal Service Retiree Health Benefit Fund (PSRHBF) for current retiree health care costs equal to premiums minus the cost of annual claims paid. The Postal Service will not incur retiree health benefit costs until either OPM's annual calculation results in a top-up payment (Sec 102(b)(1)), or the PSRHBF is exhausted, and it is required to make contributions to OPM for annuitant premiums.

Accepted analytical principles dictate the treatment of the costs incurred by the Postal Service, and do not require inclusion of costs that are not incurred. Applying the accepted principles to the costs incurred under the new requirements of PSRA does not require the Commission to accept a change in analytical principles. As a result, under the accepted methodology, there are no amortization and normal costs to account for in the Postal Service's financial reporting for FY 2022. Including such costs not incurred by the Postal Service would require a change in accepted methodology.

Order No. 6363 at 10. The Commission does not mention a principle that economic costs cannot exceed accounting costs in this discussion. Instead, it states that the Postal Service will not incur retiree health benefit costs and that the accepted principles “do not require inclusion of costs that are not incurred.” The mailers’ request for reconsideration argued that the costs *were* incurred, and thus that the existing principles require them to be attributed to products. In the alternative, it argued that the principle should be changed to recognize the retiree health benefit normal costs that were incurred. Because the Commission did not articulate the principle that economic costs can never exceed accounting costs, the petition did not seek a change in that principle.

Importantly, it was the Commission’s Order No. 6363 that mailers were responding to with their petition, *not* the Postal Service’s January 4 comments, in which the Postal Service suggested for the first time that economic costs cannot exceed accounting costs. The Mailers’ Request for Reconsideration and petition for change to analytical principles were addressed solely to the principle set forth in Order No. 6363. The fact that the *Postal Service* identified a different principle in comments filed subsequently to Order No. 6363 and the Mailers’ request

and petition hardly resolves the procedural concern. The Postal Service cannot define the scope of a docket in a responsive pleading, especially when its pleading cites only to prior Postal Service comments in an unrelated docket for the principle it is espousing.⁴ While mailers did seek leave to respond to the Postal Service’s comments, those comments responded to the Postal Service in the context of Order No. 6363, focusing on whether the normal costs had been incurred.

For this same reason, the Postal Service’s argument that mailers would have been better served by filing a petition to change the analytical principle announced in Order No. 6363 rather than requesting reconsideration of that order is unavailing. *See* USPS Motion at 2. If mailers had not filed their request for reconsideration, they would never have learned that the Commission considered that the determinative analytical principle in this situation is that economic costs may not exceed accounting costs—a concept it had not mentioned in Order No. 6363 nor in the Secretary’s October 7, 2022, letter to the Postal Service. Thus, not only did mailers have an absolute right to file that request pursuant to 39 CFR § 3010.165, but doing so clarified the issues to be addressed in this proceeding. Had the Mailers “simply filed their proposal as envisioned by Order No. 6363,” as the Postal Service suggests,⁵ the Mailers might have had to wait until a Commission order on that petition to be informed of the analytical principle they were seeking to change.

To reiterate, Mailers do not oppose the Postal Service’s request for leave to file reply comments. Mailers submit this response to correct the record regarding the procedural

⁴ *See* Docket No. RM2023-1 and RM2023-3, Response of the United States Postal Service to Mailers’ Motion for Reconsideration and Petition at 20 (Jan. 4, 2023) (citing Postal Service Comments in Docket No. RM2007-1; *see also* Docket No. RM2023-3, Comments of the Association for Postal Commerce at 2-3 (explaining that Docket No. RM2007-1 was not focused on analytical principles, and the Commission did not reference the principle cited by the Postal Service in its order).

⁵ USPS Motion at 2.

requirements of the Commission's rules, the legal standards governing this proceeding, and the history of this proceeding to date.

Respectfully submitted,

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